18-2811(L)
USA v. Blaszczak

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

- - - - - -

August Term, 2020

(Argued: June 9, 2021 Decided: December 27, 2022)

Docket Nos. 18-2811, 18-2825, 18-2867, 18-2878

UNITED STATES OF AMERICA,

Appellee,

- v. -

DAVID BLASZCZAK, THEODORE HUBER, ROBERT OLAN, CHRISTOPHER WORRALL,

Defendants-Appellants.

Before: KEARSE, WALKER, and SULLIVAN, *Circuit Judges*.

Appeals, following vacatur and remand by the United States Supreme Court for further consideration, in light of *Kelly v. United States*, 140 S. Ct. 1565 (2020), of this Court's prior affirmance of judgments of the United States District Court for the Southern District of New York convicting some or all of the defendants on substantive counts of

conversion of government property in violation of 18 U.S.C. § 641, wire fraud in violation of 18 U.S.C. § 1343, and securities fraud in violation of 18 U.S.C. § 1348; and convicting certain of the defendants on various counts of conspiring to engage in conduct violating one or more of the above sections, all originating from misappropriation of confidential information from the Centers for Medicare & Medicaid Services ("CMS"), *see United States v. Blaszczak*, 947 F.3d 19 (2d Cir. 2019), *vacated and remanded*, 141 S. Ct. 1040, 2021 WL 78042, 2021 WL 78043 (Jan. 11, 2020). On this remand: (A) defendants contend that their argument that the CMS information at issue does not constitute "property" or a "thing of value" within the meaning of the above statutes is supported by the Supreme Court's decision in *Kelly*; (B) the government, concurring in that contention, confesses error as to the substantive counts and as to a count charging only conspiracy to violate §§ 1343 and 1348 (Count Two); and it agrees that either the defendants' convictions on those counts should be reversed, or the cases should be remanded to the district court so that the government can dismiss those counts pursuant to Fed. R. Crim. P. 48(a); and (C) the government seeks affirmance on the remaining conspiracy counts (Counts One and Seventeen).

Given the Supreme Court's decision in *Kelly* and the prosecutorial discretion to which the Executive Branch of the government is entitled, we grant the government's request to remand the cases to the district court for dismissal of the substantive counts and Count Two. As to Counts One and Seventeen, the verdicts do not reveal whether the jury

found that the charged defendants conspired to commit offenses as to which the government has confessed error or instead found that they conspired to engage in other charged criminal conduct. Accordingly, we vacate the convictions on these two counts and remand for such further proceedings as may be appropriate.

Remanded for dismissal of the substantive counts and Count Two; vacated and remanded for further proceedings on Counts One and Seventeen.

Judge Walker joins the majority opinion and concurs in a separate concurring opinion, in which Judge Kearse joins.

Judge Sullivan dissents, in a separate opinion.

ERIC J. FEIGIN, Deputy Solicitor General, United States Department of Justice, Washington, D.C. (Elizabeth B. Prelogar, Acting Solicitor General, United States Department of Justice, Washington, D.C.; Audrey Strauss, United States Attorney for the Southern District of New York, Ian McGinley, Joshua A. Naftalis, Won S. Shin, Assistant United States Attorneys, New York, New York, on the brief), *for Appellee*.

DONALD B. VERRILLI, JR., Washington, D.C. (Elaine J. Goldenberg, Jonathan S. Meltzer, Dahlia Mignouna, Jacobus P. van der Ven, Munger, Tolles & Olson, Washington, D.C., David Esseks, Eugene Ingoglia, Alexander Bussey, Allen & Overy, New York, New York, on the brief *for Defendant-Appellant Robert Olan*; Daniel M. Sullivan, James M. McGuire, Holwell Shuster & Goldberg, New York, New York, Stephen Fishbein, John A. Nathanson, Shearman & Sterling, New York, New York, on the brief *for Defendant-Appellant Christopher*

Worrall; Alexandra A.E. Shapiro, Daniel J. O'Neill, Eric S. Olney, Shapiro Arato Bach, New York, New York, Barry H. Berke, Dani R. James, Kramer Levin Naftalis & Frankel, New York, New York, on the brief *for Defendant-Appellant Theodore Huber*; Colleen P. Cassidy, Barry D. Leiwant, Federal Defenders of New York, New York, New York, on the brief *for Defendant-Appellant David Blaszczak*), *for Defendants-Appellants*.

KATHERINE R. GOLDSTEIN, New York, New York (Akin Gump Strauss Hauer & Feld, New York, New York, on the brief), *Court-appointed Amicus Curiae, in support of reinstatement of this Court's decision of affirmance*.

Peter Neiman, New York, New York (Nicholas Werle, Wilmer Cutler Pickering Hale and Dorr, New York, New York, Jessica Lutkenhaus, Wilmer Cutler Pickering Hale and Dorr, Washington, D.C.; Lindsay A. Lewis, Committee of the National Association of Criminal Defense Lawyers, New York, New York, of counsel), *submitted a brief for Amicus Curiae National Association of Criminal Defense Lawyers in support of reversal*.

Roman Martinez, Washington, D.C. (Michael Clemente, Latham & Watkins, Washington, D.C., Jason M. Ohta, Latham & Watkins, San Diego, California; Stephen R. Cook, Brown Rudnick, Irvine, California, Justin S. Weddle, Weddle Law, New York, New York, of counsel), *submitted a brief for Amicus Curiae Jeffrey Wada in support of Defendants-Appellants and reversal*.

Michael H. McGinley, Philadelphia, Pennsylvania (Michael P. Corcoran, Dechert, Philadelphia, Pennsylvania, of counsel), *submitted a brief for Amicus Curiae The Alternative Investment Management Association in support of reversal*.

KEARSE, *Circuit Judge*:

This appeal returns to us on remand from the United States Supreme Court for further consideration, in light of *Kelly v. United States*, 140 S. Ct. 1565 (2020), of this Court's prior affirmance of judgments of the United States District Court for the Southern District of New York convicting defendants David Blaszczak, Theodore Huber, Robert Olan, and Christopher Worrall of conversion of government property in violation of 18 U.S.C. § 641 and wire fraud in violation of 18 U.S.C. § 1343; and convicting Blaszczak, Huber, and Olan of securities fraud in violation of 18 U.S.C. § 1348 ("Title 18 securities fraud"), conspiracy to commit wire fraud and Title 18 securities fraud in violation of 18 U.S.C. § 1349, and conspiracies in violation of 18 U.S.C. § 371 to, *inter alia*, convert government property and defraud the United States, all originating from misappropriation of confidential information from the Centers for Medicare & Medicaid Services ("CMS"), *see United States v. Blaszczak*, 947 F.3d 19 (2d Cir. 2019) ("*Blaszczak I*"), *vacated and remanded*, 141 S. Ct. 1040, 2021 WL 78043 (Jan. 11, 2021). On this remand: (A) defendants contend that their argument that the CMS information at issue does not constitute "property" or a "thing of value" within the meaning of the above statutes is supported by the Supreme Court's decision in *Kelly*; (B) the government, concurring in that contention, confesses error as to those substantive counts and as to a conspiracy count premised only on crimes concerning

"property" (Count Two); and it agrees that either the defendants' convictions on those counts should be reversed, or the cases should be remanded to the district court so that the government can dismiss those counts pursuant to Fed. R. Crim. P. 48(a); and (C) the government seeks affirmance on the remaining conspiracy counts on which one or more defendants were convicted (Counts One and Seventeen).

For the reasons that follow, given the Supreme Court's decision in *Kelly* and the prosecutorial discretion to which the Executive Branch of the government is entitled, we grant the government's request to remand the cases to the district court for dismissal of the substantive counts and the conspiracy charged in Count Two. As to Counts One and Seventeen, the verdicts do not reveal whether the jury found that the charged defendants conspired to engage in alleged conduct other than that which the government no longer contends was criminal. Accordingly, we vacate the convictions on these two counts and remand for such further proceedings as may be appropriate.

I. BACKGROUND

The history of this prosecution, summarized briefly here, is set out in *Blaszczak I*, 947 F.3d 19, familiarity with which is assumed.

CMS is an agency within the United States Department of Health and Human Services. CMS administers Medicare and Medicaid, including *inter alia*, issuing rules setting reimbursement rates for healthcare providers. The rules may impact the stock prices of companies that offer products and services covered by the rates.

Worrall was an employee at CMS; Blaszczak, a consultant for hedge funds, was a former CMS employee. Huber and Olan were partners in a hedge fund ("Deerfield"). At various times between 2009 and 2014, Worrall gave Blaszczak nonpublic information about the timing and substance of proposed CMS rule changes that would change reimbursement rates for certain types of medical care for various health conditions. Blaszczak gave that information to Huber, Olan, or another Deerfield partner, following which Deerfield engaged in profitable short sales of shares of companies that would be negatively affected by reimbursement rate reductions when they became effective. Between 2010 and 2013, Blaszczak also gave such information to another hedge fund client, following which that fund profitably maintained its short positions and purchased put-options in shares of such companies.

A. *The Prosecution and the Convictions*

With respect to the above activities, defendants were indicted and tried on substantive charges of Title 18 securities fraud in violation of § 1348, securities

fraud in violation of 15 U.S.C. § 78j(b) and 78ff, and 17 C.F.R. § 240.10b-5 (collectively "Title 15 securities fraud"), wire fraud in violation of 18 U.S.C. § 1343, and conversion of United States property (*i.e.*, the CMS information) in violation of 18 U.S.C. § 641. All four defendants were charged with conspiracy, in violation of 18 U.S.C. § 371, to commit Title 15 securities fraud, to convert government property, and to defraud the United States (Count One), and conspiracy in violation of 18 U.S.C. § 1349 to commit wire fraud and Title 18 securities fraud (Count Two). Blaszczak was charged in Count Seventeen with conspiracy in violation of § 371 to convert government property and to defraud the United States.

The jury acquitted all of the defendants on all substantive counts of Title 15 securities fraud. On the other substantive charges, all four defendants were convicted on at least one count of § 641 property conversion and at least one count of § 1343 wire fraud: Blaszczak was convicted on a total of three counts of § 641 property conversion, two counts of § 1343 wire fraud, and two counts of Title 18 securities fraud. Huber and Olan were each convicted on one count of § 641 property conversion, one count of § 1343 wire fraud, and one count of Title 18 securities fraud. Worrall was convicted only on one count of § 641 property conversion and one count of § 1343 wire fraud. As to the conspiracy counts, Blaszczak, Huber, and Olan were convicted on Counts One and Two; Blaszczak was convicted on Count Seventeen.

On appeal, defendants challenged their convictions on the principal ground that §§ 1343 and 1348 apply to fraudulent schemes to obtain "money or property" and that § 641 applies to conversion of "money[] or [a] thing of value" of the government, and that CMS's confidential information as to its plans for announcing changes in medical service reimbursement rates was not government "property" or a "thing of value" within the meaning of those statutes. The majority in *Blaszczak I* disagreed, and the convictions were affirmed.

B. *The Supreme Court's Decision in* Kelly

Following denial of defendants' petitions for rehearing in this Court and a stay of their time to seek further review, defendants petitioned the Supreme Court for certiorari. In the meantime, the Supreme Court had decided *Kelly*.

Kelly involved politically motivated conduct by officials in the administration of New Jersey's then-Governor Chris Christie to cause significant traffic gridlock for several days in Fort Lee, New Jersey--terminus of the George Washington Bridge to Manhattan--by reducing the Bridge's toll plaza lanes accessed from Fort Lee from three lanes to one, in retribution for the refusal of Fort Lee's mayor to endorse Christie's bid for reelection. The plan was executed under the guise of a traffic study; its exposure as a sham led to the officials' criminal prosecution.

The officials were charged with wire fraud in violation of 18 U.S.C. § 1343 (which prohibits schemes "for obtaining money or property"), fraud on a federally funded entity (*i.e.*, the Port Authority, which administered the Bridge) in violation of 18 U.S.C. § 666(a)(1)(A) (which prohibits fraudulently "obtain[ing] . . . property" from such an entity), and conspiracy to commit those crimes. After the defendants were convicted and their convictions were affirmed on appeal, the Supreme Court reversed.

The Court held that the defendants' conduct did not fall within the scope of § 1343 or § 666(a)(1)(A) because their scheme did not aim to deprive the Port Authority of money or property. The Court noted that the federal fraud statutes are "limited in scope to the protection of property rights," *Kelly*, 140 S. Ct. at 1571 (internal quotation marks omitted), and do not "criminaliz[e] all acts of dishonesty," *id*. Thus, the government was required to prove, *inter alia*, that the object of the defendants' fraud was money or property, *see id*. at 1571-72. Instead, the Court concluded, the *Kelly* defendants, by deciding the distribution of lanes for drivers on the toll road, had exercised the government's regulatory rights of "'allocation, exclusion, and control.'" *Id*. at 1573 (quoting *Cleveland v. United States*, 531 U.S. 12, 23 (2000)). The Court stated that such regulatory rights "do 'not create a property interest,'" *Kelly*, 140 S. Ct. at 1573

(quoting *Cleveland*, 531 U.S. at 23), and thus, "a scheme to alter such a regulatory choice is not one to appropriate the government's property," *Kelly*, 140 S. Ct. at 1572.

The Court rejected the government's arguments that the property aspect of § 1343 and § 666(a)(1)(A) was satisfied either because the physical lanes that the defendants "'commandeer[ed]'" were government property, *id*., or because their project required expenditures of time and labor by Port Authority employees. The Court held that for conduct to be within those statutes, property must be more than an incidental aspect of the fraud; it "must be an 'object of the fraud.'" *Id*. at 1573 (quoting *Pasquantino v. United States*, 544 U.S. 349, 355 (2005)). As the object of the defendants' scheme was clearly to alter "a regulatory decision about the toll plaza's use" for political retaliation, rather than to take the lanes from the government or to convert them to non-public use, the lanes as property played no more than a "bit part in [the] scheme." *Kelly*, 140 S. Ct. at 1573. Similarly, in contrast to a misuse of public employees to renovate an official's home, the defendants merely altered a regulation; "[e]very regulatory decision" involves some employee labor, and that expended by the Port Authority employees was "only an incidental byproduct of the scheme." *Id*. at 1573-74.

C. *The Parties' Positions on Remand in Light of* Kelly

In the present case, defendants successfully petitioned for certiorari, with some support from the government: "At the request of the Acting Solicitor General, the Supreme Court granted the petitions" of defendants for certiorari, "vacated this Court's judgment, and remanded the case for further consideration in light of *Kelly*." (Government brief on remand at 2.)

Defendants on this remand renew their principal contention that the CMS information at issue does not constitute "property" or a "thing of value" within the meaning of the fraud and conversion statutes, and they contend that that conclusion is supported by the Supreme Court's decision in *Kelly*. Their opening brief on remand urges that all of their convictions be reversed.

The government on remand, insofar as the substantive counts of conviction are concerned, agrees with defendants that those counts cannot stand. It states that,

> [i]n light of the Supreme Court's holding in *Kelly*, it is now the position of the Department of Justice that in a case involving confidential government information, that information typically must have economic value in the hands of the relevant government entity to constitute "property" for purposes of 18 U.S.C. §§ 1343 and 1348. . . . A related, though not necessarily identical, analysis applies when determining what confidential information is a "thing of value" under 18 U.S.C. § 641. The Department has determined that the confidential information at issue in this case does not constitute "property" or a "thing of

> value" under the relevant statutes after *Kelly*. To be sure, this Court recognized that "CMS *does* have an economic interest in its confidential predecisional information" because the agency "invests time and resources into generating and maintaining the confidentiality of" that information, and leaks affect the "efficient use of its limited time and resources." *Blaszczak[I]*, 947 F.3d at 33. But in the Department's view, shaped by *Kelly*, the CMS employee time at issue in this case did not constitute "an object of the fraud," and thus the associated "labor costs could not sustain the conviction[s]" here. *Kelly*, 140 S. Ct. at 1573.

(Government brief on remand at 7-8 (emphasis in brief).) "Accordingly," the government states, "this Office is constrained to confess error at the direction of the Solicitor General's Office" (*id*. at 8; *see also id*. at 2 ("This brief was prepared in consultation with the Office of the Solicitor General to reflect the Department of Justice's post-*Kelly* position on the scope of 'property' under 18 U.S.C. §§ 1343 and 1348, and a 'thing of value' under 18 U.S.C. § 641, which this Office is constrained to follow.")). The government urges that we either "reverse . . . the convictions" for conversion of United States property (Counts Three, Thirteen, and Eighteen), wire fraud (Counts Nine and Fifteen), Title 18 securities fraud (Counts Ten and Sixteen), and conspiracy to commit wire fraud and Title 18 securities fraud (Count Two) (Government brief on remand at 8-9), or that we remand the matter to the district court in order to permit the government to have those eight counts dismissed pursuant to Federal Rule of Criminal Procedure 48(a) (Government response to brief of Court-appointed amicus curiae at 8).

The government argues, however, that the conspiracy convictions on Counts One and Seventeen should be affirmed. Count One, on which Blaszczak, Huber, and Olan were convicted, alleged that defendants' objectives were not only to convert government property in violation of § 641, but also to commit Title 15 securities fraud and to defraud the United States in violation of 18 U.S.C. § 371. And Count Seventeen, alleged only against Blaszczak, alleged that his objectives were both conversion of government property and defrauding the United States. The government acknowledges that "[i]n light of [its] confession of error, . . . the Government is constrained to concede that the § 641 objects are legally invalid," but it argues that "the § 371 defraud-clause objects were not affected by *Kelly* and remain legally valid." (Government brief on remand at 10.) The government also concedes that the jury's "general verdict[s]" on Counts One and Seventeen, and "the presence of both legally invalid and legally valid objects gives rise to error" (*id*. (citing *Yates v. United States*, 354 U.S. 298 (1957))). However, it argues that the error is harmless in light of the "overwhelming evidence" that Blaszczak conspired with Huber and Olan (the Deerfield partners) to defraud the United States in connection with Deerfield's stock trading (Count One), and that Blaszczak conspired with another client to defraud the United States in connection with that client's stock trading (Count Seventeen).

In reply, defendants concur in the government's proposal to have the substantive counts and Count Two dismissed. Blaszczak, Huber, and Olan, in reply to the government's contention that their conviction(s) on Counts One and Seventeen should be affirmed, dispute the government's contention that any lack of clarity as to the basis of the jury verdicts on these counts was harmless. They argue that it is instead likely that the jury based its conspiracy verdicts on the § 641 allegations, given that the government ended its rebuttal summation by urging "the jury to 'take the jury form and mark guilty on Count One, *because that is a conspiracy to steal government information*.'" (Defendants' reply brief on remand at 13 (quoting trial transcript (emphasis in brief)).) They argue that the convictions on Counts One and Seventeen, if not reversed, must at least be vacated.

II. DISCUSSION

For the reasons that follow, given the Supreme Court's decision in *Kelly* and the prosecutorial discretion to which the Executive Branch of the government is entitled, we grant the government's request to remand these cases to the district court for dismissal of the seven substantive counts of conviction and the conspiracy conviction in Count Two. In light of the lack of clarity as to whether the jury's

verdicts of guilt on Counts One and Seventeen were based on findings of conspiracy to violate § 641 or instead on conspiracy to defraud the government in violation of § 371 (or in Count One on conspiracy to commit Title 15 securities fraud), we vacate the judgments on Counts One and Seventeen and remand for such further proceedings on these counts as may be appropriate.

A. *The Government's Confession of Error in Light of* Kelly

"[O]ne of the core powers of the Executive Branch of the Federal Government [is] the power to prosecute." *United States v. Armstrong*, 517 U.S. 456, 467 (1996). "'[S]ubject to constitutional constraints,'" *id*. at 464 (quoting *United States v. Batchelder*, 442 U.S. 114, 125 (1979)), such as prohibitions against invidious discrimination, *see generally Armstrong*, 517 U.S. at 464-65, or vindictive prosecution, *see generally United States v. Goodwin*, 457 U.S. 368, 373-74 (1982), the United States "Attorney General and United States Attorneys retain 'broad discretion' to enforce the Nation's criminal laws," *Armstrong*, 517 U.S. at 464 (quoting *Wayte v. United States*, 470 U.S. 598, 607 (1985) (other internal quotation marks omitted)).

> In the ordinary case, "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether *or not* to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion."

Armstrong, 517 U.S. at 464 (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (emphasis ours)).

> This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake.

Wayte, 470 U.S. at 607; *see also United States v. Knox*, 32 F.3d 733, 739 n.3 (3d Cir. 1994) ("[A] prosecutor always has broad discretion to decide the circumstances that warrant prosecution of a person for what the prosecutor fairly believes is unlawful conduct. When the prosecutor decides to prosecute, . . . it is the exclusive function of the judiciary to determine whether the conduct charged is unlawful *unless the prosecutor then withdraws the prosecution*." (emphasis added)).

The Federal Rules of Criminal Procedure provide, as pertinent here, that "[t]he government may, with leave of court, dismiss an indictment . . . ." Fed. R. Crim. P. 48(a).

> The principal object of the "leave of court" requirement is apparently to protect a defendant against prosecutorial harassment, *e.g.*, charging, dismissing, and recharging, when the Government moves to dismiss an indictment over the defendant's objection. . . . But the Rule has also been held to permit the court to deny a Government dismissal motion to which the defendant has consented if the motion is prompted by *considerations clearly contrary to the public interest*.

Rinaldi v. United States, 434 U.S. 22, 29-30 n.15 (1977) (emphasis added); *see generally United States v. Cowan*, 524 F.2d 504, 509-11 (5th Cir. 1975) ("*Cowan*") (the "leave of court" requirement was added by the Supreme Court to the originally proposed version of Rule 48(a), which had required the government merely to give a statement of its reasons for dismissing a prosecution), *cert. denied sub nom. Woodruff v. United States*, 425 U.S. 971 (1976).

The government may elect to eschew or discontinue prosecutions for any of a number of reasons. Rarely will the judiciary overrule the Executive Branch's exercise of these prosecutorial decisions. For example, in *Petite v. United States*, 361 U.S. 529 (1960), the government, while not opposing the defendant's certiorari petition challenging his prosecution and conviction on the ground of double jeopardy, informed the Supreme Court that the Department of Justice ("Department" or "Justice Department"), "wholly apart from the question of the legal validity of the claim of double jeopardy," was considering whether the second prosecution of the defendant was consistent with Department policy for the control of government litigation. *Id.* at 530. Thereafter, the Solicitor General having announced a general policy against multiple prosecutions arising out of a single transaction or against a federal prosecution that would be duplicative of a state prosecution, *see id.* at 530-31, the government moved for, and the Supreme Court granted, a "remand[] to the Court of

Appeals to vacate its judgment [of affirmance] and to direct the District Court to vacate its judgment [of conviction] and to dismiss the indictment," *id*. at 531.

Even when a defendant has been tried, convicted, and sentenced in a prosecution that, under the *Petite* policy, would not have been brought if the Justice Department's internal procedures had been properly or timely followed, the courts have granted the government's eventual motion to vacate the conviction and have the indictment dismissed. *See, e.g.*, *Rinaldi*, 434 U.S. at 23, 29-30; *United States v. Houltin*, 553 F.2d 991, 991-92 (5th Cir. 1977).

In *Gaona-Romero v. Gonzales*, 497 F.3d 694 (5th Cir. 2007), a government motion seeking termination of a proceeding reflected a change in a different Justice Department policy. The government moved to vacate a court of appeals decision upholding the removal of an alien who had been convicted of a controlled substances offense, but whose conviction had been vacated. The government reviewed its policy with regard to such cases, and decided to follow a revised Board of Immigration Appeals ("BIA") interpretation of "conviction," *see* 8 U.S.C. § 1101(a)(48)(A), to exclude convictions that were vacated on the basis of procedural or substantive error. The court of appeals granted the motion and "remand[ed] to the BIA so that the government may follow through on its pledge to withdraw the charge of removability." *Id*. at 695.

In cases in which the government itself has come to the view that a given defendant may not have been guilty of the crime of which he was convicted, the government has similarly moved to discontinue or dismiss the prosecution. For example, in *United States v. Weber*, 721 F.2d 266 (9th Cir. 1983), after Weber and his codefendants had been convicted and sentenced, the Assistant United States Attorney who had prosecuted the case interviewed Weber, received new information, and reexamined the evidence. As a result he "develop[ed] a serious and substantial doubt as to Weber's guilt," *id*. at 268, and the government moved under Rule 48(a) to dismiss the indictment against Weber. The district court, while stating that it had "no doubt" as to the prosecutor's "good faith doubt regarding Weber's guilt," *id*., denied the motion, apparently believing such a motion could not be granted after the defendant had been convicted, *see id*. at 269.

The court of appeals reversed, holding that "[s]eeking dismissal because of the existence of such a reasonable doubt" as to the defendant's guilt is "not clearly contrary to the manifest public interest." *Id*. (internal quotation marks omitted); *see also United States v. DiMattina*, 571 F. App'x 50, 50 (2d Cir. 2014) ("Defendant Frank DiMattina argues that his conviction for extortion is invalid because he did not 'obtain' any property for purposes of the Hobbs Act. The Government, in its brief on appeal, agrees and concedes that the judgment must be vacated in all respects. The

Government now seeks remand to the District Court 'so that [it] can move to dismiss the indictment with prejudice under Rule 48(a) of the Federal Rules of Criminal Procedure.' Appellee Br. 11. We agree that is the appropriate course of action.").

In *United States v. Smith*, 55 F.3d 157 (4th Cir. 1995) ("*Smith*"), Smith, who had originally pleaded not guilty and was being tried with four codefendants, decided mid-trial to plead guilty and agreed to testify against his codefendants. He testified truthfully, but the codefendants were acquitted. The government then moved under Rule 48(a) to dismiss the indictment against Smith, stating two reasons.

> First, [it] pointed to the acquittal of Smith's four codefendants and expressed the opinion that if Smith had not pleaded guilty, he, too, certainly would have been acquitted. Second, the United States Attorney pointed out that after pleading guilty Smith cooperated with the government and testified truthfully. The United States Attorney emphasized that dismissal promoted credibility in future attempts to enlist defendants to plead guilty, cooperate with the government, and truthfully testify in return for lenient treatment. He summed up his reasons as follows: "Obviously, it is not only in the public interest to do what is fair and right, but it is also in the public's interest to encourage persons with knowledge to cooperate with the United States."

Id. at 160. The district court, however, while finding no bad faith on the part of the United States Attorney, denied the motion, based on the court's "own assessment" that it "would be clearly contrary to [the] manifest public interest" to dismiss the indictment against Smith given that "Smith's guilty plea and corroborating testimony constituted substantial evidence of his guilt." *Id*.

The court of appeals reversed. While noting that the district court's own decision was reviewable for abuse of discretion, it pointed out that the exercise of judicial discretion in this regard must respect the prosecutorial discretion conferred on the Executive Branch:

> The court's discretion must be exercised in conformity with Rule 48(a) and the construction that the Supreme Court has placed on the rule. Because the discretion granted by Rule 48(a) involves the constitutional issue of the Separation of Powers Doctrine, a reviewing court must carefully scrutinize the district court's action. In *Newman v. United States*, 382 F.2d 479, 480 (D.C.Cir. 1967), Chief Justice Burger, then a circuit judge, wrote: "Few subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings, or what precise charge shall be made, or whether to dismiss a proceeding once brought."

Smith, 55 F.3d at 158.

> "Rule [48(a)] was not promulgated to shift absolute power from the Executive to the Judicial Branch. Rather, it was intended as a power to check power. The Executive remains the absolute judge of whether a prosecution should be initiated and the first and presumptively the best judge of whether a pending prosecution should be terminated. The exercise of its discretion with respect to the termination of pending prosecutions should not be judicially disturbed unless clearly contrary to manifest public interest. In this way, the essential function of each branch is synchronized to achieve a balance that serves both practical and constitutional values."

Smith, 55 F.3d at 158-59 (quoting *Cowan*, 524 F.2d at 513).

> *The disposition of a government's motion to dismiss an indictment should be decided by determining whether the prosecutor acted in good faith at the time he moved for dismissal. A motion that is not motivated by bad faith is not clearly contrary to manifest public interest, and it must be granted.* . . . [T]he trial court has little discretion in considering a government motion to dismiss made pursuant to Federal Rule of Criminal Procedure 48(a). *It must grant the motion absent a finding of bad faith or disservice to the public interest.* . . . *The disservice to the public interest must be found, if at all, in the motive of the prosecutor*. Examples of disservice to the public interest include the prosecutor's acceptance of a bribe, personal dislike of the victim, and dissatisfaction with the jury impaneled.

Smith, 55 F.3d at 159 (internal quotation marks omitted (emphases ours)); *see*, *e.g.*, *Rinaldi*, 434 US. at 30 (regardless of the government's reasons for initiating or maintaining a prosecution, the "salient issue" as to its later decision to terminate it is whether the request to dismiss the indictment is "tainted with impropriety").

The *Smith* court of appeals reversed the denial of the government's Rule 48(a) motion, concluding that the district court's "own assessment of the public interest" and "[w]eighing [of] these interests d[id] not give adequate recognition to the Executive in the context of the Separation of Powers Doctrine as it exercises its duty in good faith to take care that the laws are faithfully executed." 55 F.3d at 160.

In *United States v. Fokker Services, B.V.*, 818 F.3d 733 (D.C. Cir. 2016) ("*Fokker*"), the government had entered into a deferred prosecution agreement ("DPA") with a defendant and had agreed not to prosecute certain persons. The district court regarded the DPA as an inappropriately "anemic[]" response to "egregious conduct"

over "a sustained period of time and for the benefit of one of our country's worst enemies," and it refused to exclude DPA cooperation time from the speedy trial clock as authorized by the Speedy Trial Act ("Act"). The court of appeals granted the government's petition for mandamus:

> [T]he Act confers no authority in a court to withhold exclusion of time pursuant to a DPA based on concerns that the government should bring different charges or should charge different defendants. Congress, in providing for courts to approve the exclusion of time pursuant to a DPA, acted against the backdrop of long-settled understandings about the independence of the Executive with regard to charging decisions. Nothing in the statute's terms or structure suggests any intention to subvert those constitutionally rooted principles so as to enable the Judiciary to *second-guess the Executive's exercise of discretion over the initiation and dismissal of criminal charges*.

Id. at 738 (emphasis added).

Finally, close to home, this Court honored the government's decision in light of *Kelly* to end its pursuit of a § 641 prosecution in *United States v. Aytes*, No. 19-3981, Dkt. No. 70 (2d Cir. Apr. 13, 2021) ("*Aytes*"). Aytes, after a jury trial in 2018, was found guilty of theft of government property in violation of § 641 for her unauthorized taking from the Federal Deposit Insurance Corporation ("FDIC") of paper and electronic copies of documents that detailed plans, in the event of a severe financial crisis, for the rapid and orderly liquidation of four banks regulated by the FDIC. Aytes successfully moved pursuant to Federal Rule of Criminal Procedure 29

for a judgment of acquittal, *see United States v. Aytes*, No. 18 CR 132, 2019 WL 5579485 (E.D.N.Y. Oct. 29, 2019); the government, with the approval of the Solicitor General, appealed. While Aytes's appeal was pending, the Supreme Court decided *Kelly* and granted certiorari in the present cases for reconsideration in light of *Kelly*; and the government in the present cases, upon instructions from the Solicitor General, confessed error and requested reversal of the convictions of--or dismissal of the indictment counts against--the present defendants on the § 641-related and other property-related counts.

The United States Attorney's Office that prosecuted Aytes, upon conferring with the Solicitor General, was instructed that the § 641 charges against her were not meaningfully distinguishable from the property-related charges in the present cases and that the government should move to dismiss its appeal from Aytes's judgment of acquittal. *See Aytes*, No. 19-3981, Dkt. No. 65 (government motion, Apr. 12, 2021). Accordingly, the government so moved; and this Court summarily granted the government's motion and its appeal was dismissed, thereby ending pursuit against Aytes of charges for theft of government regulatory information under § 641, *see Aytes*, No. 19-3981, Dkt. No. 70 (order of dismissal, Apr. 13, 2021).

With these considerations in mind, we conclude that the government's decision to seek the dismissal of the seven substantive counts convicting defendants under §§ 1343, 1348, and 641, along with the conspiracy charges in Count 2, is appropriate and owed deference. Nonetheless, we are also mindful that the government's confession of error "does not automatically govern an appellate court's disposition of an appeal." *United States v. Vasquez*, 85 F.3d 59, 60 (2d Cir. 1996) (collecting cases); *see also Young v. United States*, 315 U.S. 257 (1942).

In *Young*--a 1942 case arising prior to the adoption of Rule 48(a) with respect to the government's desire to dismiss a prosecution--a physician convicted of failing to maintain records required by the Harrison Narcotics Act, 26 U.S.C. §§ 2551(a) and (b), contended that his conduct fell beyond the record-keeping requirement. The government confessed error, and requested reversal and remand to the district court with direction to dismiss that count of the indictment. The Supreme Court declined to reverse without considering the merits:

> The public trust reposed in the law enforcement officers of the Government requires that they be quick to confess error when, in their opinion, a miscarriage of justice may result from their remaining silent. But such a confession does not relieve this Court of the performance of the judicial function. The considered judgment of the law enforcement officers that reversible error has been committed is entitled to great weight, but our judicial obligations compel us to examine independently the errors confessed. *See Parlton v. United States*, 64 App.D.C. 169, 75 F.2d 772. The public interest that a result be reached which promotes

> a well-ordered society is foremost in every criminal proceeding. That interest is entrusted to our consideration and protection as well as that of the enforcing officers. Furthermore, our judgments are precedents, and the proper administration of the criminal law cannot be left merely to the stipulation of parties.

Young, 315 U.S. at 258-59.

To the extent that this Court is required to address the merits of the convictions on the counts as to which the government confesses error and/or requests a remand for dismissal, *see generally Young*, we conclude that in light of *Kelly*, §§ 1343, 1348, and 641 do not apply to the conduct that was at issue here.

B. *The Confidential Information and the Timing of Agency Action Are Not CMS's "Property"*

As indicated in Part I.B. above, the *Kelly* Court noted that the relevant federal fraud statutes such as § 1343 are "limited in scope to the protection of property rights" and do not "criminaliz[e] all acts of dishonesty," and that the government therefore was required to prove, *inter alia*, that the object of the defendants' fraudulent scheme was money or property, *Kelly*, 140 S. Ct. at 1571-72 (internal quotation marks omitted). *Kelly* held that the defendants' conduct affecting the operation of the Port Authority did not fall within the scope of § 1343 or § 666(a)(1)(A) because "[t]he wire fraud statute thus prohibits only deceptive "'schemes to deprive [*the victim* of] money or property.'" 140 S. Ct. at 1571 (quoting *McNally v.*

United States, 483 U.S. 350, 356 (1987)) (brackets in *Kelly*; emphasis ours); *see*, *e.g.*, *Cleveland*, 531 U.S. at 15 ("the thing obtained must be property in the hands of the victim"); and the objective of the *Kelly* defendants' scheme was neither to deprive the Port Authority of its money or property nor to utilize for defendants' own purposes that agency's employees' paid time, but rather to reallocate the Bridge's access lanes. *Kelly* concluded that "a scheme to alter such a regulatory choice is not one to appropriate the *government's* property," *Kelly*, 140 S. Ct. at 1572 (emphasis added).

In the present case the same is true with respect to the counts charging various defendants with fraud in violation of §§ 1343 and 1348 or with conversion of government property in violation of § 641. In contrast, as to the counts of the indictment that charged violations of the Title 15 securities laws, the actual and intended victims of the alleged frauds would have been investors in the market for securities of the companies whose fortunes would be affected by the regulations promulgated by CMS. Indeed, as noted by the Court-appointed amicus curiae, "[a]t its core, this was a case about insider trading--an act already understood to be wrongful under [Title 15]." (Brief of Court-appointed amicus curiae at 19.) But the jury acquitted defendants on all of those Title 15 substantive counts; and in the remaining substantive counts at issue here, on which the jury convicted--the fraud

sections, §§ 1343 and 1348, and the section prohibiting "conver[sion]" of "money," or a "thing of value" from "the United States or any department or agency thereof," 18 U.S.C. § 641--the purported victim would have been the government agency CMS. Thus, defendants could not properly be convicted of violating §§ 1343, 1348, or 641 unless the objective of their schemes and conduct was money or property of CMS.

The Supreme Court in *Kelly* noted that it had previously established that a government agency's "exercise of regulatory power . . . fails to meet the [federal fraud] statutes' property requirement." 140 S. Ct. at 1568-69; *see id*. at 1572 (with regard to "a deceptive scheme to influence, to his own benefit, [a governmental entity's] issuance of gaming licenses," "this Court has already held that a scheme to alter such a regulatory choice is not one to appropriate the government's *property*" (citing *Cleveland*, 531 U.S. at 23) (emphasis added)). No greater property interest was involved in the CMS information at issue in the present case.

While confidential information may constitute property of a commercial entity such as the publisher victim in *Carpenter v. United States*, 484 U.S. 19 (1987)--for which confidential information was its "stock in trade, to be gathered at the cost of enterprise, organization, skill, labor, and money, and *to be distributed and sold to those who [would] pay money for it*," *id*. at 26 (internal quotation marks omitted; emphasis

ours)--the same is not true with respect to a regulatory agency such as CMS. CMS is not a commercial entity; it does not sell, or offer for sale, a service or a product.

CMS adopts regulations that affect, *inter alia*, business organizations or health industry entities, whether the affected persons or entities favor the regulations or not. And while CMS seeks to maintain confidentiality as to its planned regulations--and the regulations can plainly have either a favorable or an adverse effect on certain business entities' fortunes--a planned CMS regulation, even if disclosed to outsiders prematurely, remains within the exclusive control of CMS. And if it is prematurely disclosed to others, the disclosure has no direct impact on the government's fisc, although it might well impact CMS's subsequent regulatory choices. CMS can adhere to its planned regulation, or it can alter or abandon it; it can publish the regulation at the time it had planned, or it can postpone or advance the announcement or the regulation's effective date. As the Supreme Court recognized in *Cleveland* and emphasized in *Kelly*, the government's right to determine "who should get a benefit and who should not . . . do[es] 'not create a property interest.'" *Kelly*, 140 S. Ct. at 1572 (quoting *Cleveland*, 531 U.S. at 23)). The information reflecting such a decision and the timing of that disclosure are regulatory in character and do not constitute money or property of the victim; and they are not a "thing of value" to CMS that is susceptible to being "convert[ed]," 18 U.S.C. § 641.

We disagree with the dissent's contention that the present decision conflicts with this Court's precedent in *United States v. Girard*, 601 F.2d 69 (2d Cir. 1979). That case involved a drug dealer's attempt to purchase confidential records of the United States Drug Enforcement Administration ("DEA") as to what persons were DEA informants in certain DEA investigations. We ruled that such confidential information was a "thing of value" to the DEA within the meaning of § 641. *See* 601 F.2d at 71. And logically so: Such information has inherent value to the DEA in investigations and preparation for prosecutions; its theft would interfere with those operations, by allowing the targets of investigations to, for example, better conceal their criminal conduct, hide their contraband, or flee from arrest, as well as by imperiling the well-being of the undercover agents and confidential informants used in those operations. We cannot agree that such inherently valuable law enforcement information is comparable to the regulatory information at issue in the present case, which was the reimbursement rates that CMS would announce for certain health services and the planned dates of the announcements.

In sum, in *Kelly*, the scheme sought to alter the agency's exercise of its regulatory power. In the present case, the goal of the conduct at issue was a step removed from any attempt at alteration; defendants instead schemed to obtain and promptly utilize advance information as to how the regulatory power would be

exercised by CMS. As the conduct in *Kelly*--altering a regulation--does not constitute a deprivation of government property, *a fortiori* merely obtaining advance information as to what the agency's preferred regulation would be, and when it would be announced, cannot properly be considered the agency's money or property or a thing of value that could be "convert[ed]."

We respect the Executive's "decisions about *whether to initiate* charges, whom to prosecute, which charges to bring, *and whether to dismiss charges once brought*." *Fokker*, 818 F.3d at 737 (emphases added). The jury found defendants not guilty on any of the substantive counts alleging Title 15 securities fraud--the core of the case. The government's election, in light of *Kelly*, not to pursue the case further as one for conversion of, or fraud to obtain, government "property" is entitled to deference. And our independent review confirms that the dismissals requested by the government are required following *Kelly*. Accordingly, these cases will be remanded to the district court for dismissal of the substantive counts and the Count Two conspiracy charges.

C. *The Remaining Conspiracy Counts*

The only remaining counts of the indictment are Count One, on which Blaszczak, Huber, and Olan were convicted of conspiring, in violation of 18 U.S.C. § 371, to convert property belonging to the United States in violation of 18 U.S.C.

§ 641, to commit Title 15 securities fraud, and to defraud the United States in violation of § 371; and Count Seventeen, on which Blaszczak was convicted of conspiring, in violation of 18 U.S.C. § 371, to violate § 641 and to defraud the United States.

As to these counts, the jury was not given questions to answer that would reveal which one or more of the alleged conspiratorial goals it found proven. And since the government has confessed error as to charges that defendants' conduct was within the scope of § 641, and it no longer seeks to sustain these conspiracy convictions on the basis of § 641 property-conversion goals, the government acknowledges that the verdicts on these counts are "'flawed'" (Government brief on remand at 12 (quoting *Skilling v. United States*, 561 U.S. 358, 414 (2010))); *see id*. at 414 (quoting *Yates v. United States*, 354 U.S. 298 (1957) ("constitutional error occurs when a jury is instructed on alternative theories of guilt and returns a general verdict that may rest on a legally invalid theory")).

The government contends, however, that the convictions on Counts One and Seventeen can be affirmed on the ground that the error was harmless. We disagree. In harmless-error analysis, the government bears the burden of proof, *see*, *e.g.*, *United States v. Vonn*, 535 U.S. 55, 62 (2002); *United States v. Groysman*, 766 F.3d 147, 155 (2d Cir. 2014); and it must sustain that burden beyond a reasonable doubt,

see generally Neder v. United States, 527 U.S. 1, 15-19 (1999) (conviction may be affirmed if, after "a thorough examination of the record," the court "conclude[s] beyond a reasonable doubt that the jury verdict would have been the same absent the error," *id*. at 19); *see United States v. Coppola*, 671 F.3d 220, 237-38 (2d Cir. 2012) (a *Yates* error would be harmless where "the jury necessarily would have had to" convict defendant on the basis of the valid ground). Given the emphasis the government placed on theft in its rebuttal summation to the jury, and the fact that the only substantive crimes on which the jury returned verdicts of guilty were the alleged property crimes under § 641, § 1343, and § 1348, we cannot conclude that the government has carried its burden. Despite the fact that a plurality of the indictment's counts alleged substantive counts of Title 15 securities fraud--and "[a]t its core," that is what this case was about--the jury acquitted each defendant on every such count in which he was charged. We see no basis on which to infer that if there had been no charges of property crimes or conspiratorial goals to commit property crimes, the jury would necessarily have found that any of the defendants conspired to commit Title 15 securities fraud or to defraud the United States. We cannot conclude that the inclusion of § 641 conversion as a goal of the conspiracies alleged in Counts One and Seventeen was an error that was harmless.

On the other hand, we are not persuaded by defendants' argument that the convictions on these counts should simply be reversed. Counts One and Seventeen allege § 371 conspiracies to defraud the United States; Count One alleges an additional objective of committing Title 15 securities fraud. Section 371 encompasses not just conspiracies to commit property crimes, but conspiracy to commit "any offense against the United States" and any conspiracy to "defraud the United States, or any agency thereof in any manner or for any purpose." 18 U.S.C. § 371; *McNally v. United States*, 483 U.S. 350, 358 n.8 (1987) (the defraud clause of § 371 "reaches conspiracies other than those directed at property interests"). The record contained sufficient evidence for submission of these counts to the jury.

We conclude that the convictions on Counts One and Seventeen should be vacated, and the cases against Blaszczak, Huber, and Olan are remanded for such further proceedings as may be necessary on these counts, which may include a new trial.

CONCLUSION

We have considered all of the parties' arguments in support of their respective positions on this remand. For the reasons discussed above, these cases are

remanded to the district court to permit the government to dismiss Counts Two, Three, Nine, Ten, Thirteen, Fifteen, Sixteen, and Eighteen. The convictions of Blaszczak, Huber, and Olan on Count One and of Blaszczak on Count Seventeen are vacated, and the cases are remanded to the district court for such further proceedings on these two counts as may be appropriate.